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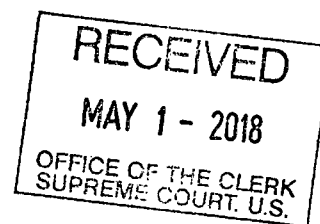
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**IN THE
SUPREME COURT OF THE UNITED STATES**

JONATHAN MORALES
Petitioner, Pro Se

VS.

**JULIE JONES, SECRETARY, FLORIDA DEPARTMENT OF
CORRECTIONS, ET AL**
Respondents



**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE 11TH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

Jonathan Morales, pro se
DC# W29491
MADISON CORRECTIONAL INSTITUTION
382 SW MCI Way
Madison, FL 32340-4430

QUESTION(S) PRESENTED

1. Whether Petitioner's Sixth Amendment rights to effective assistance of counsel and due process were violated by counsel's failure to investigate and call known and available material witnesses who would have provided non-cumulative, exculpatory testimony refuting the State's theory of prosecution thereby casting reasonable doubt in the minds of the jury as to Petitioner's guilt.
2. Whether Petitioner's Sixth Amendment rights to effective assistance of counsel and due process were violated by counsel's affirmative misadvice to Petitioner as to his choice to allow or strike a juror who was properly subject to removal, where counsel represented to Petitioner that if he followed counsel's advice he would be "guaranteed" a new trial on appeal, should he lose at trial.

LIST OF PARTIES

All parties to this Petition appear in the caption of the case on the cover page.

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**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] Cases from federal courts:

The opinion of the United States Court of Appeals for the 11th Circuit appears at Appendix A to the petition, and is unpublished.

The opinion of the United States District Court for the Southern District of Florida appears at Appendix B to the petition, and is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 28, 2017.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on January 23, 2018.

The jurisdiction of this Court is invoked under 28 U.S.C.S § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution which provide in pertinent part as follows:

AMENDMENT 5 – Criminal actions-Provisions concerning-Due process of law and just compensation clauses

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6 – Rights of the accused

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defense*.

AMENDMENT 14, Section 1 – Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The statutory provisions involved in this petition are 28 U.S.C. § 2254(d)(1)-(2), which provide in pertinent parts as follows:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings *unless the adjudication of the claim--(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.*

STATEMENT OF THE CASE

In February 2004, Petitioner Jonathan Morales, and his co-defendant Israel Fonseca, Jr., were both charged by a grand jury Indictment filed in the Circuit Court of the 15th Judicial Circuit, in Palm Beach County, Florida. The Indictment alleged two counts of capital first degree murder with a firearm (counts one and two), and one count of shooting into an occupied vehicle (count three).

The facts underpinning the State's case involved the murders of Adrian Waldron and Louis Tedesco, which occurred on November 15, 2003. Morales entered a plea of not guilty and the case proceeded to trial on January 10, 2006. Jury selection took place without objection and the jury was sworn in.

At trial, State witness Lucas Scuteri testified that on November 15, 2003, he was at a bar called Brain Brews along with Waldron, Tedesco and Israel Fonseca. Scuteri testified that Israel Fonseca was together with Waldron at the bar. Scuteri testified that at some point, in the side parking lot of the bar, he observed Fonseca bleeding from the nose, standing over Waldron after what appeared to be a fight. Scuteri testified that Fonseca seemed angry, and that he later observed Waldron and Tedesco in the back seat of an older Crown Victoria along with Fonseca and his girlfriend who were in the front seat. He testified that there was a lot of loud yelling from Fonseca's girlfriend (Jackie Neering), and that both Waldron and Fonseca were yelling back at her (TT 616-632, 656). It was established that Waldron and Tedesco smoked marijuana together on a daily basis, and that Waldron would buy cocaine from Fonseca, who was a drug dealer (TT 650-651, 653). Scuteri testified that he left the bar around 3:30 a.m., and that he never saw Morales make any gestures toward Waldron or Tedesco (TT 659).

Walter Sargent also testified at trial. Sargent's testimony indicated that he saw Fonseca and Waldron outside of Brew's pub with another friend called Chris Linsinbiber. Sargent testified that after he saw Fonseca and Waldron outside engaged in what appeared to be play fighting, they both came inside the bar. He also testified that at some point later when he went outside the bar to smoke a cigarette, and that he observed Waldron get into the driver's seat of the Green Ford Explorer, Tedesco got in the front passenger seat, and Fonseca sat in the back seat, at which time they all drove away together (TT 665-671).

The State's case against Petitioner was substantially based upon the inconsistent testimony of State witness Marina Natalucci, who was Fonseca's ex-girlfriend. Curiously, Natalucci testified that she and Fonseca left the bar "in Fonseca's Town Car" and that Tedesco and Waldron left together with them in the Green Explorer.

According to Natalucci, they stopped and picked up the Petitioner at a house in West Lantana, Florida; and that they later stopped at a park to go get some cocaine from Brandon Hammond ("B"). Natalucci testified that Fonseca exited the car and left her behind talking with Waldron and Tedesco, but that Brandon got very upset because they had taken Waldron and Tedesco to his house when he did not know them, for all he knew they could have working with the police.

Natalucci testified that when Fonseca returned to the car he told Petitioner Morales to get into the Green Explorer with Waldron and Tedesco, whereupon they drove to the end of Tucks Road. It is unclear from Natalucci's testimony however, if Petitioner ever got into the Green Explorer because she later testified that when they arrived at Tucks Road, Fonseca and Morales got out of the car (presumptively the Town Car) and went over to the Green Explorer, and that soon thereafter she heard gun shots (TT 926-942).

After this point, Natalucci's testimony provides a narrative which seems to implicate only the Petitioner as the shooter. For example she testified that Fonseca returned to the car with nothing in his hands but that Petitioner had a silver chain and two guns in his hands, a silver one, and a black one. Natalucci also testified that Morales made incriminating statements as they were leaving the scene of the shooting, and that after driving around for about 20 minutes they dropped Petitioner at the same house where they had picked him up (TT 942-949).

Natalucci admitted that she never called police, and that she lied to detectives when they came to her house asking questions several days after the shooting. She admitted that when she spoke with police about the events of November 14 and 15, 2003, she withheld all information regarding the incident at Tucks Road in a sworn statement she gave at the Palm Beach County Sheriff's office. Natalucci also testified that upon returning from a Thanksgiving trip to New York, she was again contacted by detectives who informed her they knew she was lying to them, but that at their meeting she again lied to them. While at the Sheriff's office, she had picked out a picture from a computer screen that was not Petitioner Morales, she indicated that Petitioner had a tattoo on one of his legs, which he does not; and that after detectives told her that they knew what Morales looked like she identified Petitioner's photo from a six-photo line-up detectives had shown her. She again identified Petitioner in court (TT 967-978, 988-990, 993).

Notably, on cross examination, Natalucci testified that she never saw either Fonseca or Petitioner Morales shoot anyone (TT 1011).

Stuart Graham, the Assistant Medical Examiner testified regarding the details of the crime scene he encountered when he arrived at the Tucks Road location sometime around 9:00 a.m. on November 15, 2003. Mr. Graham testified regarding the position of the bodies, and the results of the autopsies he performed on the victims. Using mannequins, he demonstrated for the jury the likely scenario in which the shooting occurred, and provided his conclusion that based on their positions the two were shot "nearly instantaneously" (TT 1041-1085).

Finally, senior forensic scientist Dawn Hicks testified that Morales' DNA was found in the right rear door handle of the Explorer, however she was unable to testify as to when the DNA had been deposited on the door handle (T 1134).

After closing arguments the jury found Petitioner guilty as charged. Thereafter, Petitioner was adjudicated guilty on counts one and two, sentenced to Life without the possibility of parole on each of those counts; and ordered that the sentence for count two be served consecutive to the sentence for count one.

Petitioner appealed his conviction and sentence to the Fourth DCA of Florida, and after that court denied relief, he sought postconviction relief by filing a rule 3.850 motion for postconviction relief, which was also denied and affirmed on appeal by the Fourth DCA.

After exhausting his state remedies at the state court of last resort, Petitioner timely filed a Habeas petition pursuant to 28 U.S.C. § 2254. That U.S. District Court affirmed the state judgment and sentence. On appeal to the 11th Circuit, the judgment of the U.S. District Court was affirmed. Petitioner sought rehearing *en banc*, and that too was denied by the 11th Circuit.

At this juncture, Petitioner has selected two issues involving Constitutional violations of his right to effective assistance of counsel and due process of law which in his view warrant Certiorari review by this Honorable Court.

First, Petitioner has consistently alleged in state and federal courts that his constitutional right to effective assistance of counsel and due process were violated as a result of counsel's failure to investigate known and available material witnesses who would have provided exculpatory testimony refuting the State's theory of defense, and would have cast reasonable doubt in the minds of the jury as to Petitioner's guilt.

Specifically, counsel inexplicably failed to call Gary A. Eakins, a known and available witness who provided police with relevant exculpatory information indicating that he knew first-hand that Ernesto Hernandez, his brother Willie Hernandez, and their uncle Benny Hernandez were responsible for the murders of Adrian Waldron and Louis Tedesco. Significantly, Mr. Eakins informed police that on the evening November 22, 2003, Ernesto Hernandez had confessed to him that he was responsible for the murders. Yet, inexplicably, counsel failed to investigate and call Mr. Eakins, or any of the Hernandez suspects previously identified by Mr. Eakins to testify at trial.

Likewise, counsel knew that Brandon Hammond, a drug dealer also known as "B," had provided a written statement to police indicating that he did not know who Petitioner Morales was. Mr. Hammond was known and available to testify, nevertheless, counsel never interviewed or called him to testify at trial. This was particularly necessary to rebut State witness testimony indicating that Petitioner was a "hit man" for Mr. Hammond. There were other known witnesses identified in the discovery disclosures by the State which were never investigated by counsel. For example, Geoffrey Appollonia, his girlfriend Alana; Aaron Diaz and another person named "Adam," all of whom could have been interviewed by counsel in order to determine if it was necessary to call them to testify at trial. Here too, counsel failed to investigate and call any of these witnesses at trial.

Second, Petitioner raised a claim involving ineffective assistance of counsel for misadvising him not to strike a juror subject to proper removal for cause. The gravamen of Petitioner's claim was that counsel relied upon his unreasonable interpretation of the law in assuring Petitioner that if he allowed the juror to remain, he was "guaranteed a new trial on appeal," in the even he lost at trial.

Relevant Procedural History in State and Federal Courts

Petitioner filed a direct appeal seeking review of judgment and sentence, and the Appeal Court for Fourth District of Florida *per curiam* affirmed the conviction and sentence without an opinion. *See Morales v. State*, 992 So.2d 268 (Fla. 4th DCA 2008).

On July 9, 2009, Petitioner filed a rule 3.850 motion for postconviction relief, in the Circuit Court of the 15th Judicial Circuit of Florida, in Palm Beach County. In his 3.850 motion, Petitioner raised 12 grounds alleging ineffective assistance of trial counsel, including the issues raised herein. The court denied the postconviction motion on November 2, 2010. Petitioner appealed, and on June 27, 2012, the Fourth DCA *per curiam* affirmed the postconviction court's decision without an opinion. *See Morales v. State*, 92 So.3d 839 (Fla. 4th DCA 2012).

Upon exhausting his judicial remedies in the State court of last resort, on November 30, 2012, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. The State filed a response on January 11, 2013, and Petitioner filed a Reply on February 5, 2013.

On September 10, 2013, the Magistrate Judge filed a Report and Recommendation that the petition be denied. On October 10, 2013, Appellant filed Objections to the Report and Recommendation. The U.S. District Court Judge for the Southern District of Florida, adopted the Magistrate's Report and Recommendation, and denied the Petition on November 7, 2013. *See Appendix B.*

On September 11, 2014, the U.S. Court of Appeals for the 11th Circuit granted a Certificate of Appealability on all four issues raised by Petitioner in his § 2254 Habeas Petition. After the issues were briefed by the parties, the 11th Circuit affirmed the District Courts dismissal of Morales' Petition. *See Appendix A.*

Petitioner timely sought Rehearing En Banc, and the 11th Circuit Court of Appeals denied rehearing on January 23, 2018. *See Appendix C.*

This Petition for a Writ of Certiorari granting discretionary review now follows.

REASONS FOR GRANTING THE PETITION

This court should grant Certiorari review for the following reasons:

The decision of the 11th Circuit in denying relief was *in conflict with the decision of another United States court of appeals*, on the same important matter; and was *contrary to, or involved an unreasonable application of, clearly established Federal law*, as determined by this Court. Moreover, the decision was *based on an unreasonable determination of the facts* in light of the evidence presented. See Sup. Ct. R. 10; 28 U.S.C. § 2254(d) 1-2.

The Appeals Court for the 11th Circuit erred in denying relief to Petitioner, and denying Rehearing *en banc*. The court, in denying relief, improperly applied the standard of review and analysis necessary to reach a determination on the merits of Petitioner's claims alleging ineffective assistance of counsel. As the questions presented herein indicate, Petitioner seeks Certiorari review on two claims involving ineffective assistance of counsel as follows:

- A. Counsel was constitutionally ineffective for failing to investigate and call material witnesses who were known, available, and would have provided testimony as to Petitioner's actual innocence, thus refuting the State's circumstantial theory of prosecution, and at the very least, casting substantial reasonable doubt in the minds of the jury as to Petitioner's guilt.**

The 11th Circuit erred in denying relief to Petitioner on his claim of ineffective assistance of counsel for failing to investigate and call material witnesses who were known, available, and would have provided material testimony as to Petitioner's actual innocence refuting the State's circumstantial theory of prosecution, and at the very least, would have cast doubt in the minds of the jury as to Petitioner's guilt.

Specifically, and perhaps most egregious, is the fact that counsel knew of the existence of a witness called Gary A. Eakins, who had informed homicide detectives from the Palm Beach County Sheriff's office that on November 21, 2003, a suspect named Ernesto Hernandez had personally confessed to him that he was responsible for the murders of Adrian Waldron and Louis Tedesco. This information was provided to counsel as part of the discovery disclosures by the State on Supplement – 7 of the Police Report prepared by the Palm Beach Sheriff's office. Counsel knew that Mr. Eakins possessed materially exculpatory evidence that would have proven Petitioner's actual innocence, or at the very least, cast substantial reasonable doubt as to Petitioner's guilt in the minds of the jury. Counsel knew Gary Eakins was available and yet, inexplicably, counsel failed to investigate, interview and call him to testify at trial, all to the obvious detriment of Petitioner. Under *Strickland*¹, such a decision could not be held to be strategic or reasonable by any measure, under the prevailing professional standards for criminal defense attorneys.

¹ *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

Counsel also knew that Brandon Hammond had provided a written statement to police indicating that he had never met Mr. Morales, and thus Petitioner argued below that counsel should have investigated and called Mr. Hammond to testify at trial in order to refute the State's theory that Petitioner was a "hit man" for Mr. Hammond. Petitioner also argued that Mr. Hammond's rebuttal testimony would have cast additional reasonable doubt in the minds of the jury, and that counsel's failure to call him at trial was not supported by any sound or reasonable strategy ever articulated by counsel.

In denying relief, the 11th Circuit first cited to the fact that Mr. Hammond's "statement [was] consistent with the witnesses' trial testimony, which established that another member of the group had known Mr. Hammond and was the one to go into Mr. Hammonds home to purchase cocaine." Petitioner fails to see the logic in this statement as a basis to deny his claim on the merits. The court in denying relief further relied on *Raleigh v. Sec'y, Florida Dep't of Corr.*, 827 F.3d 938, 956 (11th Cir. 2016), which held that "[w]hich witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom if ever, second guess." However, in order to determine whether an accused has received ineffective assistance of counsel within the meaning of the Federal Constitution's Sixth Amendment, a court, in assessing the reasonableness of counsel's investigation of potential mitigating evidence, must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. *See Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 56 L Ed 2d 471 (2003).

Therefore, to determine if counsel's decision to not investigate or call material exculpatory witnesses was in itself reasonable, the court must conduct an objective review of counsel's performance, measured for reasonableness under prevailing professional norms, including a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time of that conduct. *See Strickland*, 466 U.S. at 688, 689. Such an "objective review" of counsel's perspective at the time, and the context surrounding counsel's decisions, could only be achieved through an evidentiary hearing, which Petitioner was never granted.

Petitioner's claim regarding counsel's decision not to investigate or call key material witnesses such as Gary Eakins, who would have provided exculpatory testimony that would have undermined the State's case, refuted the theory of prosecution, and casting substantial reasonable doubt in the minds of the jury, required an inquiry of the "context" and circumstances when counsel's decision was made in light of the evidence presented by the State to incriminate Petitioner at trial, including a determination of the credibility of the State witnesses presented.

There is no question that defense attorneys have a duty to investigate the circumstances surrounding the alleged crimes of their client. *See United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989); *accord Strickland*, 466 U.S. at 691 ("Counsel has a duty to make reasonable investigations or to make a *reasonable decision* that makes particular investigations unnecessary").

That said, it is also well settled that “diligent counsel may draw a line when they have good reason to think further investigation would be a waste.” *Rompilla v. Beard*, 545 U.S. 374, 383, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005). Accordingly, Petitioner recognizes that “trial counsel [is] not bound by an inflexible constitutional command to interview ‘every possible witness.’” *Lewis v. Mazurkiewicz*, 915 F.2d 106, 113 (3d Cir. 1990); accord *Nealy v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985) (“Defense counsel is not required ... to investigate *everyone* whose name happens to be mentioned by the defendant”) (emphasis added).

Nonetheless, in light of the mountain of impermissible hearsay testimony offered by State witness Marina Natalucci, who was an admitted liar and thus an unreliable witness, counsel’s decision not to investigate known and available key material witnesses who would have refuted Natalucci’s testimony, was far from a sound and/or reasonable strategy, especially when assessed in the context of the State’s largely circumstantial case against Petitioner. Even when a decision by counsel could be considered one of “strategy,” such a decision is not immune from attack, as it must be a decision based on *reasonable* strategy. See *Jones v. Wood*, 114 F.3d 1002, 1010 (9th Cir. 1997). In Petitioner’s case, the jury had been exposed to 14 different objectionable hearsay statements by State witness Natalucci which were listed on Petitioner’s 3.850 motion in state court. As such, Counsel’s unreasonable actions in this particular case failed to subject the State’s case to meaningful adversarial testing, and resulted in prejudice to Petitioner.

The prejudicial effect of Natalucci’s impermissible hearsay statements was further amplified by the Prosecutor’s closing argument, which made Natalucci’s hearsay statements a prominent feature of the State’s case at closing. While it is true that Federal Rules of Evidence 803, 804, and 807 provide exceptions in which hearsay statements are admissible, when a hearsay statement is testimonial, the Confrontation Clause *prohibits* its admission at trial, *even if it falls within a hearsay exception*. That prohibition can only be overcome if (1) the statement’s declarant is unavailable, and (2) the defendant has had a prior opportunity to cross-examine the declarant. See *United States v. Baker*, 432 F.3d 1189, 1203 (11th Cir. 2005) (citing *Crawford v. Washington*, 541 U.S. 36, 59, 68, 124 S.Ct. 1354, 1369, 1374, 158 L.Ed.2d 177 (2004)).

One example of a prejudicial hearsay statement by Natalucci involved her testimony that “B” – a mysterious drug boss, ordered the executions of the victims in this case, and that it was Petitioner and his co-defendant Israel Fonseca who carried out the murders. In this case, “B” (the declarant), was available for cross-examination but Petitioner was never afforded an opportunity to cross-examine him because counsel failed to investigate and call this witness at trial.

Therefore, Petitioner contends that the 11th Circuit’s analysis of his ineffective assistance claim was erroneous with regards to the reasonableness of counsel’s actions in failing to investigate, interview and call material witnesses who were known and available and would have provided exculpatory testimony refuting the State’s theory of prosecution, and would have cast substantial doubt in the minds of the jury as to Petitioner’s guilt. As such, it is reasonable to conclude that absent counsel’s errors, the outcome of the proceeding would have been different.

The prejudice suffered by Petitioner was compounded throughout his multiple efforts seeking postconviction relief in state and federal courts, where his allegations regarding counsel's errors in failing to investigate, interview and call key material witnesses, were neither afforded a presumption of truthfulness under summary denial standards, nor was Petitioner ever afforded an opportunity to fully and fairly litigate his claims at an evidentiary hearing in order to properly assess the reasonableness of counsel's actions and decisions.

B. Counsel was constitutionally ineffective for affirmatively misadvising Petitioner not to strike a juror who was properly subject to removal, where that advice was based solely on counsel's flawed theory that allowing the juror to remain would "guarantee a new trial on appeal," in the event he lost at trial.

Petitioner also sought relief on grounds that counsel was ineffective for providing affirmative misadvice as to his choice to either strike a juror for cause, or allow that juror to remain empanelled, where his decision was based solely on counsel's assurance that by allowing the juror to remain he would be guaranteed a new trial on appeal if he lost at trial.

In denying relief, the 11th Circuit focused solely on the subject juror's confirmation that she "absolutely" understood Mr. Morales had a right not to testify and that she "absolutely" could be a fair juror even if Mr. Morales did not testify." See Appendix A, p. 3. The court however, ignored the fact that after the inquiry was performed, the judge gave Petitioner the option to strike for cause, or allow the juror to remain, and that based solely on counsel's advice, he chose to allow the juror to remain empanelled, to ensure a new trial on appeal if he lost at trial.

The relevant question necessary to resolve Petitioner's claim involved a determination of (1) whether counsel's advice to Petitioner was reasonable, and based on a sound understanding of the applicable law at the time; and (2) whether counsel's foundational premise for providing the subject advice, i.e. that by allowing the juror to remain, Petitioner was "guaranteed new trial on appeal," was an error which affected the outcome of the proceeding to a degree that it undermined the reliability of the outcome, and thus resulted in prejudice as outlined in *Strickland* for determining ineffective assistance of counsel.

In denying relief as to his claims, the 11th Circuit failed to perform a comprehensive *Strickland* analysis. Instead, it simply proceeded to review Petitioner's affirmative decision to allow the juror to remain empanelled and concluded, in essence, that Petitioner could not complain about the results of his affirmative decision. However, in so doing, the court failed to take into account that such an affirmative decision by Petitioner was solely based upon counsel's ill-fated and unreasonable advice that by allowing the juror to remain, he would be "guaranteed" a new trial on appeal if he lost at trial. Petitioner's long and frustrated quest for relief in state and federal courts speaks for itself as to how sound and reasonable counsel's advice was at the time, and its resulting prejudice.

Significantly, the 11th Circuit has decided cases involving misadvice of counsel, and held that counsel “decisions that are based on mistaken beliefs certainly are neither strategic nor tactical.” *Green v. Nelson*, 595 F.3d 1245, 1251 (11th Cir. 2010) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 383-387, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)); see also *Horton v. Zant*, 941 F.2d 1449, 1461 n. 30 (11th Cir. 1991) (“[S]o called ‘strategic’ decisions that are based on mistaken understanding of the law ... are entitled to less deference”).

Similarly, the 9th Circuit has held that “[e]ven if [a] decision could be considered one of strategy, that does not render it immune from attack – it must be *reasonable strategy*.” *Jones v. Wood*, 114 F.3d 1002, 1010 (9th Cir. 1997) (emphasis in original).

It is well settled that if an attorney *articulates a strategic reason* for a decision that was sound at the time it was made, the decision generally “cannot support a claim of ineffective assistance of counsel.” See *United States v. Lathrop*, 634 F.3d 931, 936 (7th Cir. 2011). However, in Petitioner’s case, counsel’s “articulated” strategy was certainly not sound by any measure, and certainly, bordered on being recklessly negligent as demonstrated by the outcome of Petitioner’s multiple frustrated attempts to obtain relief.

Significantly, the prejudice resulting from counsel’s unreasonable advice has been further compounded where, in adjudicating his claims for relief, state and federal courts have summarily rejected his allegations regarding counsel’s off-the-record advice as to striking or keeping a juror, and the foundation for such advice; and neither state nor federal courts have afforded Petitioner a presumption of truthfulness under summary denial standards, nor given him an opportunity to fully and fairly litigate his claims at an evidentiary hearing.

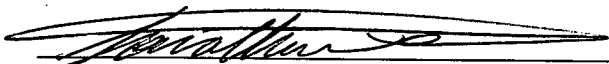
As such, the practice of improperly resolving claims of ineffective assistance of counsel under *Strickland* by proceeding directly to a review of a criminal defendant’s actions, without regard to the role that counsel played in those actions, is an issue which affects not only the Petitioner herein, but also thousands of other criminal defendants similarly situated, and thus is an issue of national importance which should be clarified by this Honorable Court.

Therefore, Petitioner prays this Honorable Court grant discretionary review on a Writ of Certiorari, thus providing Petitioner a full and fair opportunity to litigate his claims on appeal from the 11th Circuit, and receive an adjudication on the merits.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



Jonathan Morales, Petitioner, *pro se*

DC# W29491

Madison Correctional Institution

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Date: 4-23-18